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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No.

JACKIE HO SEE, *Petitioner,*

VS.

JUAN L. PANGELINAN, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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JURISDICTION

Jurisdiction in this court is conceded.

ISSUES

1. The decision of the United States Court of Appeals for the Ninth Circuit is not in conflict with the decisions of other circuits.

2. The United States Court of Appeals for the Ninth Circuit has not sanctioned a departure by the District Court of Guam from the normal course of

judicial procedure and does not call for an exercise of this Court's power of supervision.

ARGUMENT

I

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The United States Court of Appeals for the Ninth Circuit adheres to the provisions of Rule 41(b), Federal Rules of Civil Procedure. Petitioner misconstrues the decision of the District Court of Guam in Civil Case No. 80-70, Appendix F of Petitioner's brief, and in Civil Case 37-71, Appendix A of Petitioner's brief. Likewise, the United States Court of Appeals for the Ninth Circuit did not erroneously construe the holding of the District Court of Guam in both cases.

The rule provides for a dismissal on the merits in certain specific types of cases unless the court in the valid exercise of its discretion chooses to dismiss without prejudice, however, the rule obviously does not apply to certain types of dismissals such as when the court lacks jurisdiction or when the plaintiff mistakes his remedy or similar cases. Respondent submits that this is such a case for the following reasons.

In Civil Case No. 80-70 plaintiff had no claim against the defendants Matagulay, Blas and Limtiaco, and sought the wrong relief against the defendant Ho See. Respondent contends that therefore the dismis-

sal was not a dismissal with prejudice within the meaning of Rule 41(b).

In Civil Case No. 37-71, the District Court of Guam made clear the reasons why the dismissal in Civil Case No. 80-70 was not within the provisions of Rule 41(b). It may be noted in passing that this was a motion to dismiss and not a motion for summary judgment under the rules.

The United States Court of Appeals for the Ninth Circuit in case No. 72-1922 held that the District Court properly concluded that the second suit was not barred by the judgment in Civil Case No. 80-70, stating that the earlier suit was dismissed solely because the remedy sought was unavailable.

Costello v. United States, 365 U.S. 265, 5 L.Ed.2d 551, 81 S.Ct. 534:

> "* * * We hold that a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b). In arguing contra, the petitioner relies on cases which hold that a judgment of denaturalization resulting from a proceeding in which the affidavit of good cause was not filed is not open to collateral attack on that ground. Title v. United States (CA 9 Cal) 263 F2d 28; United States v. Failla (DC NY) 164 F.Supp. 307. We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41(b) which operate as adjudications on the merits unless the court specifies otherwise. It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental juris-

dictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. Failure to file the affidavit of good cause in a denaturalization proceeding falls within this category. * * *

* * * If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. * * *

We do not discern in Rule 41(b) a purpose to change this common law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. * * *"

Durham v. Mason and Dixon Lines, Inc., 404 F.2d 864 (1968, 6 Cir.):

"* * * The sustaining of a motion to dismiss for failure to state a claim upon which relief can be granted is a judgment on the merits. * * * On the other hand, sustaining a motion to dismiss for failure to exhaust the grievance procedure provided in a collective bargaining agreement results only in a dismissal of the action without prejudice.

* * * This failure to exhaust the grievance procedure deprived the District Court of jurisdiction and therefore precluded a decision on the merits. * * *"

Safeway Stores v. Fannan, 308 F.2d 94 (1962, 9 Cir.):

"* * * That rule contemplates that ordinarily a dismissal (like a judgment upon a directed verdict) shall operate as a judgment upon the merits. But it grants a broad discretion to the judge to specify otherwise. * * *"

Warren Company v. Neel, 284 F.Supp. 203 (1968, Arkansas):

"* * * Although not specifically mentioned, 'election of remedies' is an essential element of the defendants' contention with respect to res judicata. However, the court is of the opinion that Warren's failure to originally pursue its claim for rescission and restitution is not fatal to its claim at this time. Without a doubt Warren mistakenly undertook to enforce its contract in the Chancery Court, but under the law of Arkansas, Ark.Stat.Ann. § 64-1201 et seq., the conditional sales contract, under which a lien was created, could not be enforced in an Arkansas court. * * *

In Midland Savings & Loan Co. v. Tradesmen's Nat. Bank, (10 Cir., 1932) 57 F.2d 686, the court at page 693 said:

The fact that it misconceived its remedy, or attempted to exercise a right to which it is not entitled, and was defeated, does not constitute an election, or preclude it from prosecuting an inconsistent, remedial right. * * *"

In § 383, Restatement of the Law, Contracts, the learned author states:

"If one of the remedies for breach of contract is not in fact available to the plaintiff, a mistaken effort made in good faith to obtain it is not a bar to a suit for a different remedy."

In 5A Corbin on Contracts, §1225, p. 492, the learned author states:

"It ought to be obvious that, when a plaintiff erroneously thinks that a certain remedy is available to him, his futile attempt to procure it by legal proceedings ought not to be described as an election between alternative remedies. * * *; and the fact that the defendant has committed a breach of duty and that some remedy other than the one erroneously sought was in fact available to the plaintiff ought not to make his penalty for the error more severe than that which must be borne by other losers. In general, the courts sustain this theory and hold that such a losing plaintiff is not barred from bringing another action for a different remedy on the theory that he has made a final and irrevocable election of remedy. * * *"

Peardon v. Chapman, 169 F.2d 909 (3rd Cir.):

"* * * Rule 41(b) of the Civil Rules has directly reversed equity's traditional doctrine that a dismissal without consideration of the merits is also without prejudice to the complainant. * * * Even so, the terms of dismissal have always been within the discretion of the court * * * This continues to be so under Rule 41. * * *

* * * On the occasion of the first postponement the Court had implied that the complaint would not be dismissed with prejudice. * * * Fol-

lowing the expression of opinion by the trial judge the second incident occurred, at which time the Court did not question the representation, made by a reputable member of the bar, of counsel's illness.

* * * Based on the Court's first expression it would seem that appellant anticipated nothing more drastic than a dismissal without prejudice. With no warning of the Court's uncommunicated change of thoughts as to dismissal, she was not afforded an opportunity of protecting her cause of action.

Under all the facts, in view of the intimation of dismissal without prejudice and of a situation thereafter arising less blameworthy than in the first instance, the dismissal with prejudice of plaintiff-appellant's cause of action was unwarranted."

II

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS NOT SANCTIONED A DEPARTURE BY THE DISTRICT COURT OF GUAM FROM THE NORMAL COURSE OF JUDICIAL PROCEDURE AND DOES NOT CALL FOR AN EXERCISE OF THIS COURT'S POWERS OF SUPERVISION.

Since the United States Court of Appeals for the Ninth Circuit does not fail to apply the provisions of Rule 41(b) and does not condone such departure by District Courts within the Circuit, it would seem that there is no reason to invoke the supervisory powers of this Court.

Petitioner fails to see the distinction between a dismissal under Rule 41(b) where the plaintiff has

chosen an available remedy and where plaintiff has either sought relief which the court did not have jurisdiction to grant, has brought an action not within the jurisdiction of this court, or has sued the wrong party.

Respondent submits that the second action was not barred by the dismissal in the first action and that no prejudice to the Petitioner existed.

CONCLUSION

For the foregoing reasons Respondent submits that certiorari should be denied.

Dated, Agana, Guam,
February 12, 1973.

Respectfully submitted,

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